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IN THE

Supreme Court of the United States

October Term, 1964

No. 29

FOREST BRITT PETER, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

---

No. 50

UNITED STATES OF AMERICA, *Petitioner,*

vs.

DANIEL ANDREW SEEGER.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

No. 51

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ARNO SASCHA JAKOBSON.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

BRIEF FOR THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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Interest of the *Amicus*

The American Jewish Congress is a national organization of American Jews, founded by Rabbi Stephen S. Wise, Supreme Court Justice Louis D. Brandeis, Federal Judge Julian Mack and others, to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are especially committed to the preservation of the great freedoms secured by the First Amendment and to the expansion by judicial interpretation of the mantle of its protection. Since the question in issue in the three cases before the Court concerns the interpretation of the First Amendment's guaranty of religious liberty and the separation of church and state, we have sought and obtained the consent of counsel for the parties in all three cases to the submission of this brief *amicus curiae*.

Preliminary Statement

In all three cases, persons called for induction into the armed forces asserted that they were entitled to exemption from military service as conscientious objectors, under Section 6(j) of the Universal Military Training and Service Act. In all three cases, the claims were rejected by the local draft boards on the ground that the draftees did not satisfy the statutory requirement of belief in a Supreme Being. In all the cases, the draftees refused to submit to induction and were prosecuted and convicted for such refusal. In two of the cases (*Seeger* and *Jakobson*), the Court of Appeals for the Second Circuit reversed the convictions; in the third (*Peter*), the Court of Appeals for the Ninth Circuit affirmed.

The Statute Involved

The pertinent part of Section 6(j) of the Universal Military Training and Service Act, 50 U. S. C. App. 456(j), provides:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * *

The Question to Which this Brief is Addressed

The sole question to which this brief is addressed is whether Congress may, consistently with the First Amendment, limit the exemption from military service of conscientious objectors to those who believe in the existence of a Supreme Being. We assume for the purposes of this brief that no additional force is derived from the due process clause of the Fifth Amendment and that a classification in respect to military exemptions which does not transgress the specific mandates of the First Amendment would be reasonable within the equal protection requirement implicit in the due process clause.

We assume too, for the purposes of this brief, that Congress can constitutionally exempt from military service

those whose unwillingness to participate is based on religion while refusing to exempt those whose unwillingness is based on philosophical, intellectual and other non-religious motivations.

Summary of Argument

I. In *Torcaso* v. *Watkins,* 367 U. S. 488 (1961), this Court held that a state could not constitutionally bar from public office persons unwilling to affirm a belief in God. Such action, the Court held, would violate the establishment clause of the First Amendment by preferring theistic over non-theistic religions. The term "Supreme Being" in the military exemption statute is synonymous with "God," but even if that were not so, the First Amendment bars preferential treatment of religions based on a Supreme Being over religions not so based. No constitutional distinction can be made between eligibility for public office and exemption from military service.

II. Administration of the requirement of belief in a Supreme Being would impose upon draft boards theological determinations which the First Amendment excludes from the competence of civil authorities.

ARGUMENT

I

Limiting conscientious exemption to persons believing in a Supreme Being constitutes preferential treatment of certain religions over others in violation of the First Amendment.

Whatever else the no-establishment clause of the First Amendment commands, it certainly commands governmental neutrality among religions. *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); *Torcaso* v. *Watkins, supra*; *Everson* v. *Board of Education,* 330 U. S. 1 (1947); *McCollum* v. *Board of Education,* 333 U. S. 203 (1948); *Zorach* v. *Clauson,* 343 U. S. 306 (1952). Government, it was held in *Torcaso,* may not prefer members of certain religions over members of other religions in determining eligibility for public office.

Religion and belief in God, as was pointed out in *Torcaso,* are not synonymous. There are ancient, well-recognized religions that are not theistic, religions such as Buddhism, Taoism and Confucianism.

A military exemption law limited to adherents of the Christian faith would obviously be unconstitutional. So too would be one which specifically excluded Buddhist, Taoists and Confucianists. Yet, this is precisely what is effected by requiring belief in God as a condition to exemption. The concept of God as generally understood is basically Judaeo-Christian (and Moslem), and Congress may no more prefer these religions over non-theistic faiths

than it may prefer Christians over Jews; and it may no more effectuate such a preference by framing it in terms of a belief in God than in terms of a belief in Jesus Christ.

It need hardly be urged that the fact that the number of adherents of non-theistic religions in the United States may be small[1] is not constitutionally significant. There were few non-Christians in Virginia in 1786; yet, according to Jefferson, the great Bill for Establishing Religious Freedom, upon which the First Amendment is founded,[2] was "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohametan, the Hindu, the infidel of every denomination."[3]

This Court's language in *Torcaso* was clear, emphatic and unqualified. Neither the Federal government nor a state "can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs" (367 U. S. at 495 (1961)).[4]

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1. In one state of the Union, Hawaii, Buddhism is probably the major faith, if Catholicism and Protestantism are deemed different religions. Stokes and Pfeffer, *Church and State in the United States* (1964) p. 560.

2. *Everson* v. *Board of Education,* 330 U. S. 1, 13 (1947); *Reynolds* v. *United States,* 98 U. S. 145, 164 (1878); *Davis* v. *Beason,* 133 U. S. 333, 344 (1890).

3. 1 Jefferson's Writings (ed. Ford) 62.

4. As noted above in the statement of the question to which this brief is addressed, we take no position on the constitutionality of distinguishing between objection to military service on religious and non-religious grounds. It is therefore unnecessary to consider whether such a distinction might be justified in terms of protecting rights under the free exercise clause while at the same time providing for the common defense.

We cannot accept the validity of the assertion in the Government's Brief in the *Seeger case* (at p. 73) that, by use of the term "Supreme Being" rather than "God," Congress showed that it did not intend to require belief in any traditional concept of God, and that, presumably, *Torcaso* is therefore distinguishable.

In the first place, the term "Supreme Being" would seem to be more personal and anthropomorphic than the neutral word "God." Secondly, there is no evidence at all that Congress had such intent; the terms "God" and "Supreme Being" are generally taken as synonymous. It is common practice to use various synonyms for the Deity. The Declaration of Independence refers to "Nature's God," "Creator," "Supreme Judge of the World," and "Divine Providence." References to the Deity in preambles to state constitutions include "God," "Almighty God," "Supreme Being," "Sovereign Ruler of Nations," and "Supreme Ruler of the Universe."[5] In *Davis* v. *Beason* (133 U. S. 333 (1890)), the Court speaks of man's relations to his "Creator," in *Zorach* v. *Clauson* (343 U. S. 306 (1952)) and *Engel* v. *Vitale* (370 U. S. 421 (1962)) to a "Supreme Being."

In none of these instances, nor anywhere else in non-theological literature, as far as we could discover, is there evidence of an intent that the use of different appellations

5. Zollman, American Church Law, 31. In the collection of "Provisions of State Constitutions and Statutes Relating to God, Divine Being, etc." prepared by the Library of Congress for House Committee on the Judiciary in connection with its hearings on School Prayers, the descriptive heading for these preambles is uniformly "God, Supreme Being." Hearings, House Committee on Judiciary, 88th Congress, 2nd Session, Senate No. 9, Part III, pp. 2600 et seq.

for the Diety should connote different consequences, and particularly not different consequences in law and government.

In any event, the same constitutional provision that forbids preferential distinctions between religions which are based on a belief in God and those which are not, forbids equally such distinctions between religions based upon a belief in a Supreme Being and religions not so based. The declaration in *Everson, supra, McCollum, supra, McGowan* v. *Maryland* (366 U. S. 420 (1961)) and *Engel* v. *Vitale, supra,* that government may not "prefer one religion over another" makes no qualification in respect to religions not based upon a belief in a Supreme Being, any more than in respect to those based on a belief in God. Can it be seriously urged that the result in *Torcaso* would have been different had Maryland required affirmation of belief in a Supreme Being rather than in God?

Nor can we accept the validity of the government's contention that a classification for military exemption based upon belief in a Supreme Being is a reasonable one. Were there no First Amendment, the argument might be tenable. The test of reasonableness in classification under the Fifth and Fourteenth Amendments is far more liberal than under the First; the scope of permissible governmental discretion is far broader. Legislative classification affecting business or commercial interests will rarely be disturbed by the Court. *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963). In such cases, the Court will interfere only if the classification is patently unreasonable. *United States* v. *Carolene Products,* 304 U. S. 144 (1938). But for legislation abridging a liberty secured by the First Amendment, a more rig-

orous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96 (1940). See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943).

Broad discretion is given to government in fixing qualifications for its officers and employees and, absent the First Amendment, it could not be said that a determination by a state that believers in God are likely to be more honest and conscientious civil servants than non-believers would be arbitrary and unreasonable. As argued by the State of Maryland in *Torcaso*, it could hardly be deemed unreasonable to require that a notary public (the office involved in that case) who is given the power to administer oaths himself believe in God. Brief for Appellee in *Torcaso*, p. 19. As noted by the Court in *Sherbert* v. *Verner* (374 U. S. 398, 410 (1963)), there was in *Torcaso* "an undoubted state interest in ensuring the veracity and trustworthiness of Notaries Public."

But the answer, as *Torcaso* makes clear, is that there are certain classifications which the First Amendment forbids government to make, irrespective of their possible fac-

tnal reasonableness, and one of these is a classification based upon a belief in God.

The Sunday Law cases, and specifically *Gallagher* v. *Crown Kosher Market* (366 U. S. 617 (1961)) and *Braunfeld* v. *Brown* (366 U. S. 579 (1961)),[6] are not inconsistent with this assertion. The Court there held that Sunday laws are today secular laws for the purpose of ensuring a uniform day of rest, and that the states are not constitutionally required to accord exemptions for religious reasons. But nothing in the Court's decision can be interpreted to give any support to an argument that the states could constitutionally exempt adherents of certain non-Christian religions from the operation of the statute while withholding the exemption from adherents of other faiths. We are confident that this Court would not uphold a statutory exemption to Sunday laws in favor of only those who observe Saturday as their holy day of rest but denied it to those who, with equal religious sincerity, observe Friday as their holy day of rest. Nor, we suggest, would the unconstitutionality of such a classification be mitigated by a not unreasonable state finding that policing problems would be much more difficult if the exemption were not limited to a single, specific day.

Nor can *Torcaso* be distinguished because in the present case the governmental interest involved is national defense. The interest of national defense might justify a refusal by Congress to grant any exemption on grounds of religious conscience. *Arver* v. *United States*, 245 U. S. 366 (1918); *Hamilton* v. *Regents of the University of Cali-*

6. We suggest that the force of these decisions has been substantially weakened by *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

fornia, 293 U. S. 245 (1934); *In re Summers*, 325 U. S. 561 (1945). But, we submit, nothing in these or any other decisions that we know of supports a conclusion that once Congress has elected to grant exemption based upon religious belief it can exclude from the grant adherents of particular minority or unconventional faiths whose religious objection to military service is not less sincere than that of adherents to the more popular and conventional faiths.

There was a time when assertion of the needs of national defense almost foreclosed all further judicial inquiry and freed government from the restraints imposed by the Bill of Rights. *Cf. Abrams* v. *United States*, 250 U. S. 616 (1919); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944); Chafee, *Free Speech in the United States, passim.* Fortunately, that time has passed and hopefully will not return. *Cf. West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Ex parte Endo*, 323 U. S. 283 (1944); *Harmon* v. *Brucker*, 355 U. S. 579 (1958); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963).

The cases now before the Court involve peacetime conscription, but we believe the classification in the exemption statute between religions based upon a belief in God and those not so based would be equally unconstitutional in time of war. As this Court has said but recently in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. at 165:

> The imperative necessity for safeguarding these [constitutional] rights * * * under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis,

that there is the greatest temptation to dispense with fundamental constitutional guarantees, which, it is feared, will inhibit governmental action. "*The Constitution of the United States is a law for rulers and people, equally in war and in peace,* and covers with the shield of its protection all classes of men, at all times and under all circumstances * * * [I]f society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded * * * these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution." (Emphasis added, quoting *Ex parte Milligan,* 4 Wall 2, 120-121, 124 (1866).)

II

Administration of the requirement of belief in a Supreme Being would impose upon civil officials the duty of making theological determinations, in violation of the First Amendment

A perusal of the records in all three cases before the Court shows vividly how deeply involved in theology draft boards become when they are required to determine whether or not a particular applicant for exemption believes in God or a Supreme Being. The draft board's task might be simpler if the exemption statute followed some early state constitutions, such as those of Pennsylvania and South Carolina, which required belief not only in "one eternal God" but also in heaven and hell and the truth and divine inspiration of the Bible. Stokes and Pfeffer, *Church and*

State in the United States, p. 81. Yet, the history of both Judaism and Christianity indicates that, even when the conception of God was bounded by the limits of the Old and New Testaments, there were fundamental theological divisions and that one group's God was another's heresy. In any event, the government does not contend nor, in view of the doctrine of *Watson* v. *Jones* (80 U. S. 679 (1871)) that the "law knows no heresy and is committed to the support of no dogma," could it contend that statutory exemption can constitutionally be limited to those who believe in the God of Torquemada or Jonathan Edwards.

If the draft boards are denied the aid of orthodox dogma in their deliberation, what standards then are available to them in deciding whether that in which the young man before them believes is a Supreme Being? What star will they have to guide them in this theological "sea of uncertainty and doubt"? *Watson* v. *Jones, supra,* at p. 732.

Suppose that, when debating the bill to amend the exemption law to require belief in a Supreme Being, some member of Congress insisted that some legislative standard be prescribed to guide the draft boards in the performance of their statutory duty. Suppose, further, that amendments were offered to define "Supreme Being." One can imagine with amazement the theological disputations that might ensue.

Suppose, finally, that, after lengthy committee hearings and floor debates, an amendment were adopted setting forth a definition of "Supreme Being." Can it be doubted that such a statutory definition—no matter how broadly phrased—would violate the mandate of the First Amendment? Can

there be any law more clearly an establishment of religion than one which establishes a definition of the Deity? And, if the Congress is constitutionally incompetent to make such a definition, can it effect this end by delegating the responsibility to thousands of local draft boards throughout the nation, particularly with no guides of any kind to assist them in discharging this truly awesome responsibility?

If the records in each of these three cases were presented to a panel of universally recognized competent theologians, it is safe to predict that they would differ sharply on whether what each of the three draft registrants believed in could reasonably be considered a "Supreme Being." How, then, can one expect a draft board of ordinary citizens to sensibly make such determination? *Watson* v. *Jones, supra; Kedroff* v. *St. Nicholas Cathedral* (344 U. S. 94 (1952)), and *Kreshik* v. *St. Nicholas Cathedral* (363 U. S. 190 (1960)) all reflect a strong constitutional policy against involvement of civil agencies in the area of theology. The cases recognize their total incompetence in this field.

It is true that, assuming as we do that an exemption limited to religious conscientious objection is constitutional, draft boards must determine whether the motivation of applicants for exemption is religious. This is no easy task, and this Court itself has had considerable difficulty with it. *Cf. Church of Jesus Christ of Latter Day Saints* v. *United States,* 136 U. S. 1 (1890); *United States* v. *Ballard,* 322 U. S. 78 (1944). But these difficulties pale in comparison to those accompanying efforts to ascertain whether the applicant believes in a "Supreme Being."

Moreover, inquiry in respect to religious motivation may be unavoidable. In *Common Sense,* Thomas Paine wrote that: "As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith." This dichotomy was formalized in the command of the First Amendment that Congress make no law respecting an establishment of religion or prohibiting its free exercise. But in order to protect conscientious professors in the free exercise of religion it may well be necessary to determine whether that which they are exercising is indeed religion. To this extent, inquiry into what is more properly the domain of theology and philosophy may be unavoidable. But beyond that, we submit, the Constitution does not permit civil agencies to go. They may neither define God nor equate religion with belief in a constitutionally undefinable God.

Conclusion

The judgments in *Seeger* and *Jakobson* should be affirmed and the judgment in *Peter* reversed.

Respectfully submitted,

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